No. 93-153

AUG 31 1993
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In The

Supreme Court of the United States

October Term, 1993

GEORGE ARNOLD
a/k/a SAMAD AHMAD,

Petitioner,

vs.

ROBERT (PETE) LEONARD, WILLIE L. PEARSON, JR., VINSON WILLIS, JOHN H. CLARKE, JR., GARY L. SMITH and FREDDIE L. WHITE,

and

THE CITY OF COLUMBUS, etc., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner's motion to intervene after settlement was properly denied where petitioner was dismissed as a plaintiff prior to trial at his own request?

PARTIES TO THE PROCEEDINGS BELOW

The petition does not list the parties to the proceedings in the Court of Appeals. They were:

Petitioner: George Arnold, a/k/a Samad Ahmad, former plaintiff and appellant in the Court of Appeals;

Respondents: Robert (Pete) Leonard, John H. Clarke, Jr., Willie Pearson, Jr., Gary Smith, Freddie White, Jr., Vinson Willis (plaintiffs and appellees below);

Respondents: City of Columbus, Georgia and the following former and current officials of Columbus – J.R. Allen, former mayor, Hugh Bently and Leonard Leavell, former members of Police Hearing Board, S.W. Brown, former Assistant Chief of Police, A.J. McClung, former mayor pro-tem, B.F. McGuffey, former Chief of Police, Joseph W. Sargis, former Director of Public Safety, the current mayor, mayor pro-tem, chief of police, assistant chief of police, and director of public safety of the City of Columbus in their official capacities (defendants and appellees below).

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INTRODUCTION

The petition presents a claim by a former plaintiff who dropped out of this lawsuit in 1975 prior to trial that he has a right to re-enter the lawsuit by a motion to intervene in order to receive an equal share of a successful monetary settlement. The factual dispute below was whether petitioner George Arnold[1] directed his attorney to dismiss his claim. The district court found that he did instruct his attorney to dismiss his claim, that his testimony to the contrary was incredible and possibly perjurious, and that Arnold had no remaining legal interest in the lawsuit. The court of appeals affirmed without opinion.

STATEMENT OF FACTS

The facts stated in the petition are misleadingly incomplete. There are two major shortcomings. First, Arnold fails to mention that two witnesses, his former lawyer and a co-plaintiff, testified that Arnold informed them he wanted to withdraw from the case and that his withdrawal from the case was pursuant to his wishes, testimony credited by the district court. Second, Arnold does not mention that the district court found all the facts against him.

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[1] Petitioner George Arnold also has the name Samad Ahmad. He will be referred to herein by the name his counsel used in the petition and as he identified himself at the evidentiary hearing, *i.e.*, Arnold.

1. The Factual Dispute, The Facts Found Against Petitioner, and Petitioner's Failure to Raise Any Issue for Review.

Shortly before trial in 1975 petitioner Arnold informed his then co-plaintiff Robert Leonard and his lawyer Margie Pitts Hames that he wished to withdraw from this lawsuit. At the opening of trial, trial counsel for plaintiffs, Joel Gora, informed the district court that Arnold was not going to pursue his claim and the court permitted the withdrawal of Arnold's claim. Transcript of February 10, 1975, p. 4.[2]

Nothing further was heard from Arnold for more than sixteen years until after the remaining parties had reached a settlement that the six plaintiffs who pursued their claims would each receive one hundred twenty thousand dollars. Arnold then surfaced but he did not contact plaintiffs' attorneys in an effort to participate in the settlement. Instead he retained separate counsel, but he and his counsel took no steps to re-enter the litigation until the district court set a hearing and ordered Arnold to appear and "If Mr. Arnold wishes to contend that he does have an interest remaining in this case, he should come prepared to present evidence of it." R3-46,[3] Order

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[2] The complaint was filed by private counsel. Beginning in 1973, representation of plaintiffs was also provided by counsel from the American Civil Liberties Union.

[3] References are to the record volume and docket numbers assigned by the district court clerk. *E.g.*, "R3-46" refers to document number 46 of volume 3 of the record.

of December 31, 1991.[4] The court took testimony from Arnold, who claimed that he had not authorized the dismissal of his claim and that for sixteen years he was not informed about the status of the lawsuit and never inquired of anyone as to the status of the lawsuit. The district court found that Arnold told his former co-plaintiff Leonard and former lawyer Hames that he no longer wished to be a plaintiff due to his religious conversion. After the hearing Arnold filed a motion to intervene and after receiving briefs from Arnold and the parties on Arnold's status, the district court found "that all disputed facts must be resolved against Arnold," Petition, p. 6a, and that his testimony that he did not authorize his attorney to withdraw his claim "is not credible." *Id.* The court amended the conclusion to its order to add, in part, the following:

> As explained above, Mr. Arnold's motion to intervene has no basis whatsoever in either the law or the facts and appears to have been motivated chiefly by a desire to share in the settlement proceeds due to the more diligent named

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[4] Arnold's factual recitation incorrectly states that he initiated steps to assert his claim, that his attorney filed a notice of appearance and the court thereafter scheduled a hearing. Petition, p. 8. The docket entries show that the court heard that there was a potential claimant, and after this person (Arnold) took no steps to assert his alleged interest for several months, entered an order on December 31, 1991 directing Arnold to appear; his attorney filed an appearance January 7, 1992.

Petitioner also states that he "was informed that a settlement had been reached but that he was not being included." Petition, pp. 4, 8 and 12. This incorrectly invites the inference that Arnold was being informed by the court or counsel of the resolution of the litigation as if he were still a party.

> plaintiffs. The court feels that a "reasonable inquiry" by Mr. Toombs [Arnold's current attorney] would have exposed this and made unnecessary the hearing at which his client quite possibly committed perjury. In considering this matter, the court has come very close to imposing sanctions on both Mr. Toombs and his client, but has decided to give them the benefit of the doubt.

R3-58, Order of January 30, 1992, appended hereto *infra*, p. 2a.

Although Arnold appealed the denial of his motion to intervene, he failed to contend that the findings of fact of the district court were clearly erroneous. Brief for Appellant, *Leonard v. City of Columbus*, 985 F.2d 579 (11th Cir. 1993). The court of appeals affirmed without opinion. Petition, 1a. In seeking review by this Court, Arnold likewise does not contend that the district court's fact finding was erroneous. The petition's statement of facts simply omits facts unfavorable to Arnold, fails to inform the Court that the underlying "facts" on which his argument is based were rejected by the courts below, and that contrary facts were found which entirely negate his argument that his due process rights were violated by the district court.

2. The Underlying Litigation and the Evidence from Petitioner's Due Process Hearing.

This case was initiated by 38 African-American police officers of Columbus, Georgia alleging violations of their first amendment rights and racial discrimination by the City of Columbus and various officials. Seven of the

officers, the six plaintiffs who are respondents here and petitioner Arnold, had been dismissed from the police department for removing an American flag patch from their uniforms. They challenged their dismissal on first amendment grounds, *inter alia*, and challenged various practices of the police department as racially discriminatory.

By the time of the pre-trial conference, plaintiffs had narrowed their claims to the dismissal of the seven officers. This is reflected in the pre-trial order of January 16, 1975 and the order of February 3, 1975. The pre-trial order set the trial date for February 10, 1975. R1-12A. At that time, Arnold was still a plaintiff and contrary to the assertion on the petition, p. 3, Arnold was notified of the trial date. Margie Pitts Hames, who has been one of plaintiffs' attorneys throughout this litigation, identified correspondence dated February 3, 1975 to Arnold and the other plaintiffs referring to the trial that would begin the next week. Plaintiffs' Exhibit 1.

Just before trial Arnold telephoned co-plaintiff Robert Leonard and informed Leonard "that he wanted to withdraw his name from the case because of his religious belief . . . " Transcript of January 10, 1992, p. 77 (hereafter "T.___"). Arnold told Leonard he had become a Muslim and that his religious advisor had counseled him that he was not allowed to participate in the judicial system and at that time he wanted to withdraw his name from the case. T. 77. Leonard met with Arnold and Arnold's brother the next day and asked Arnold not to withdraw. Arnold repeated his reasons for withdrawing –

> [H]e had changed his religious belief, he had changed his name and he just didn't believe in the white folk's justice anymore and he wanted to release his name – his name taken off.

T. 78. Leonard told Arnold to get in touch with plaintiffs' lawyer about withdrawing. *Id.* Arnold telephoned Hames:

> HAMES: In 1975, shortly before the trial of this case, I received a call from Mr. Arnold, telling me that he wanted to withdraw from the case, he would not be participating in the trial.
>
> . . .
>
> HAMES: I asked him not to withdraw from the case. We were anxious to present a united front in the case. However, he said that his religion prohibited him from participating in the case. And I at that time did not know he had converted to – had become a Muslim, and he explained that to me. And he said he did not believe in a white man's justice and that he did not want to participate in the case.

T. 62-63. The religious conversion as the reason for Arnold's withdrawal was confirmed the week before the 1992 evidentiary hearing when Arnold told Leonard

> that he had been ill advised by his Minister Rockmart [*sic*] and that he was going to just explain to the judge that he had been led wrong and had asked for his name to be taken off, when hopefully that he would consider him being reinstated on the case.

T. 80. At the opening of the 1975 trial Arnold's claim was withdrawn. The remaining six plaintiffs participated at trial and throughout this litigation.

The six plaintiffs were eventually successful in securing a final determination that their dismissal violated their first amendment rights and the case was returned to the district court "for a determination of the appropriate remedy." *Leonard v. Columbus*, 705 F.2d 1299, 1306 (11th Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984).[5] On remand the parties engaged in extensive litigation concerning the elements of the remedy. Defendants sought to limit recovery to nominal damages, and both parties engaged in voluminous discovery. The district court, per Honorable Duross Fitzpatrick, entered three opinions narrowing the issues between the parties. R2-14, R3-35, R3-38. None of this mentioned or involved Arnold.

The district court directed the parties to participate in nonbinding mediation and on September 3, 1991 the six plaintiffs and defendants agreed to a settlement proposed by the mediator. Prior to the parties arranging for final settlement papers and payment of the agreed sums, Arnold or an attorney acting for him began making inquiries about participating in the settlement. R3-40 and R3-41. The district court ordered that Arnold appear at a hearing on January 10, 1992, affording him the opportunity to present any evidence he had that he had an

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[5] The district court, per Honorable J. Robert Elliott, originally abstained after trial, ruling it did not have jurisdiction. R1-18A. This was vacated and remanded, *Leonard v. Columbus*, 551 F.2d 974 (5th Cir. 1977), *adhered to en banc*, 565 F.2d 957 (5th Cir. 1978), *cert. denied*, 443 U.S. 905 (1979).

On remand the district court entered judgment for defendants. R1-31A. Plaintiffs, respondents here, appealed and the court of appeals reversed on the merits.

interest remaining in this case. R3-46, Order of December 31, 1991, p. 2.

His claim having been dismissed, Arnold neither appeared at trial nor participated in any of the legal proceedings from 1975 until January, 1992. At the January 10, 1992 hearing Arnold claimed he had not authorized his dismissal and sought to explain why, if he were still a plaintiff, he had not been heard from for sixteen years. Arnold said he relied upon Leonard, who served as liaison between counsel and plaintiffs, to keep him informed of the status of the litigation. T. 34, 35, 76, 81-2, 99. Arnold and the six plaintiffs knew each other since school days, T. 38, 76, and Arnold described Leonard as "a life long friend and spokesman for the seven Plaintiffs." Brief for Appellant, *supra*, p. 17. Arnold never asked Leonard about the lawsuit even when Arnold heard that the trial had been held without him. He made no inquiry nor did he claim, as he now does, that he had not been notified of the trial. T. 40, 41, 47, 48, 52-57. Arnold did not offer any reason his life long friend and his then attorneys would act against his wishes. Nor did he contend that the settlement reached between the six plaintiffs and the city defendants was in any way connected with the dismissal of Arnold's claim, or that plaintiffs gained some advantage or benefit by the dismissal of the claim.

3. Findings of the District Court.

The district court rejected Arnold's position on legal and factual grounds. The legal grounds were (1) that a client is bound by the actions of his attorney, Petition, p. 6a, and Arnold did not dispute that his attorney had

dismissed his claim; and (2) that Arnold's motion to intervene was untimely and would "prejudice the rights of the existing parties by delaying the termination of this litigation, which the plaintiffs have diligently pursued for many years." *Id.*

The factual grounds were that Arnold's testimony that he never authorized his attorneys to dismiss his claim, that he relied on the attorneys and Leonard to keep him informed even when he knew he was not included at the trial, and "*never once inquired about the status of the litigation during the sixteen years that passed between the trial and the settlement*" was "not credible." Petition, p. 6a (emphasis in original).

The court found:

> It is simply impossible to believe that if Arnold had remained as a plaintiff in the case he would not once have contacted somebody about the status of the litigation as the years went by, especially since he knew of the litigation and that he was not being included. The only logical and reasonable explanation for Arnold's absence during the trial and reappearance at the time of settlement is that he withdrew in 1975 and now wants back in to try and claim a share of the reward. Arnold's incredible explanation for his silence does nothing but bolster the credibility of Hames' and Leonard's explanations of why he withdrew and Leonard's story of the conversation he and Arnold had earlier this year.

Id. The court found that the fact that Arnold hired a new lawyer rather than first contacting plaintiffs' attorney when he heard of the settlement further disproved his

claim. "The only believable explanation for Arnold's behavior is that he had dismissed his claim in 1975 and knew that the attorneys involved in the case would not assist him in obtaining a portion of the settlement funds." Petition, p. 7a.

The court found that no reason had been shown as to why plaintiffs and their counsel would have conspired to drop Arnold from the case. "Such a plan would expose them to considerable risks for no benefit." Petition, p. 7a. And the court found that "[a]fter hearing the evidence, studying the demeanor of the witnesses and examining the post-hearing briefs, the court has concluded that all disputed facts must be resolved against Arnold." Petition, p. 2a. As noted above, the court filed an amended order in which it found that the motion to intervene "has no basis whatsoever in either the law or the facts," that Arnold "quite possibly committed perjury," and held that it came close to imposing sanctions on both the attorney and the client *sua sponte*. *Infra*, p. 2a.

4. Class Action Aspects.

The petition, including petitioner's question presented, makes several statements regarding this lawsuit being filed as a class action.[6] Petitioner presents no issue regarding the dismissal of the class action allegations,

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[6] The question presented as framed by petitioner does not include the information that he had been a plaintiff. It suggests that he was an unnamed class member, a stranger to the litigation whose legal claim was dismissed without due process, without his consent and without his knowledge.

and expressly took the position in the district court that he did not wish to revive the class action. T. 9, 12, 14-15. Arnold merely claimed, which was not in dispute, that he had been a member of the purported class. *Id.*

The complaint asserted a Rule 23(a) and (b)(2), F.R.Civ.P. class of black persons who were refused employment by the police department or disciplined, discharged, denied promotions or assignments because of race. The class allegations were terminated by the pre-trial order in 1975. Because no order stated whether the class was certified or not, the district court directed plaintiffs to show cause at the January 10, 1992 hearing why certification should not be denied "since the class-based claims were apparently either dismissed or abandoned in 1975 . . . " R3-46, Order of December 31, 1992, p. 1. Plaintiffs put on evidence that the class allegations were voluntarily withdrawn at the 1975 pre-trial hearing, T. 6-7, and the court formally denied class certification. Petition, p. 5a. Arnold did not appeal that order.

REASONS FOR DENYING THE WRIT

The petition presents no reason, issue or other consideration which merits review by this Court. Petitioner asks this Court to review a factual contention which he lost in two federal courts below. This Court routinely denies review of such petitions except under the most unusual circumstances. *Neil v. Biggers*, 409 U.S. 188, 193, n. 3 (1972). Petitioner presents his argument as if the record supports his view of the facts, completely choosing to disregard that all factual disputes were resolved

against him. *Cf. Blau v. Lehman*, 368 U.S. 403, 408 (1962) ("Petitioner apparently seeks to have us decide the questions presented as though he had proven the allegations of his complaint . . . "). Even if this Court sat to hear claims of erroneous fact finding, which it has repeatedly said it does not, *United States v. Johnston*, 268 U.S. 220, 227 (1925), review would not be warranted because petitioner failed to appeal the adverse findings of fact to the court of appeals. In that court, as here, he merely acted as if the facts had not been found against him. *Leonard v. City of Columbus*, U.S. Court of Appeals for the Eleventh Circuit, No. 92-8197, Brief for Appellant, *supra*. The failure to raise such claims below is reason to deny the writ. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

This Court's rule of practice under which the Court is reluctant to disturb findings of fact concurred in by two lower federal courts, *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Neil v. Biggers, supra*, is fully applicable here.

Petitioner accuses the two courts below of "causing an unjustified deprivation of Petitioner's property interest without due process of law" by their "reluctance to inquire into the facts and circumstances of this case," and argues "the district court refused to adequately consider" the reasons Petitioner should be allowed to intervene. Petition, pp. 11-12. None of this is borne out in this record. To the contrary, the district court provided petitioner a full evidentiary hearing to advance his version of events. The resulting finding that petitioner's testimony was incredible was done within the fullest provision of

due process. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

ROBERT LEONARD, et al.,	:	
Plaintiff,	:	
vs.	:	CIV. NO.
THE CITY OF COLUMBUS, et al.,	:	1514-COL
Defendants.	:	

ORDER

(Filed JAN 30 1992)

This court has just recently denied Mr. Arnold's motion to intervene in the pending settlement of this case and now feels compelled to direct some comments towards Mr. Arnold's attorney, Hillman Toombs, Esq. To that effect, the previous order is hereby AMENDED to add the following paragraphs to the conclusion:

> Although nothing stated herein should be construed as intended to affect Mr. Arnold's decision regarding a possible appeal of this order, the court must note that Mr. Arnold's case, as presented by Mr. Toombs, comes dangerously close to being considered frivolous. Federal Rule of Civil Procedure 11 states that an attorney's signature on a pleading signifies:
>
> > that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or

> reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

One could make a strong argument that Mr. Toombs' case, as it developed in the hearing and in the brief filed thereafter, in no way approaches this standard. As explained above, Mr. Arnold's motion to intervene has no basis whatsoever in either the law or the facts and appears to have been motivated chiefly by a desire to share in the settlement proceeds due to the more diligent named plaintiffs. The court feels that a "reasonable inquiry" by Mr. Toombs would have exposed this and made unnecessary the hearing at which his client quite possibly committed perjury. In considering this matter, the court has come very close to imposing sanctions on both Mr. Toombs and his client, but has decided to give them the benefit of the doubt.

SO ORDERED, this 29 day of January, 1992.

/s/ Duross Fitzpatrick
Duross Fitzpatrick, Judge
UNITED STATES
DISTRICT COURT

MEM\bb